

November 19, 2013

Daniel I. Werfel  
Principal Deputy Commissioner  
Internal Revenue Service  
1111 Constitution Ave., N.W.  
Washington, DC 20224

**VIA FAX: 202-622-5756**

Re: Complaint Against Americans for Tax Reform

Dear Principal Deputy Commissioner Werfel:

Citizens for Responsibility and Ethics in Washington (“CREW”) respectfully requests the Internal Revenue Service (“IRS”) investigate whether Americans for Tax Reform (“ATR”), a non-profit organization exempt from taxation pursuant to section 501(c)(4) of the Internal Revenue Code (“Code”), violated the Code by engaging in excessive political activity, and whether ATR and its president, Grover Norquist, violated federal law by filing a tax return that failed to disclose more than \$6 million ATR spent on political activity ATR in 2012.<sup>1</sup>

**Americans for Tax Reform’s Political Activity**

The Federal Election Campaign Act and Federal Election Commission (“FEC”) regulations require any person making an independent expenditure to disclose the expenditure to the FEC on periodic reports.<sup>2</sup> Independent expenditures are defined as expenditures “expressly advocating the election or defeat of a clearly identified candidate.”<sup>3</sup> In reports signed under penalty of perjury by ATR Chief of Staff Christopher Butler, ATR disclosed to the FEC it made \$15,794,582 in independent expenditures in 2012.<sup>4</sup>

Most of ATR’s independent expenditures were spent on producing and broadcasting a series of television advertisements opposing the election of Democratic candidates for Congress. For example, ATR reported to the FEC spending \$1,575,152 to produce and broadcast television

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<sup>1</sup> CREW submits this letter in lieu of Form 13909; a copy is being sent to the Dallas office.

<sup>2</sup> 2 U.S.C. § 434(c), (g); 11 C.F.R. §§ 104.4(e)-(f), 109.10(b)-(d).

<sup>3</sup> 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

<sup>4</sup> Americans for Tax Reform, FEC Form 5, October Quarterly Report, October 5, 2012, available at <http://images.nictusa.com/pdf/533/12954282533/12954282533.pdf>; Americans for Tax Reform, FEC Form 5, Year-End Report, January 20, 2013, available at <http://images.nictusa.com/pdf/020/13940054020/13940054020.pdf>.

advertisements against Sal Pace, the Democratic candidate for a House seat in Colorado.<sup>5</sup> Two advertisements told voters to “vote no on Sal Pace for Congress,” and another one said Mr. Pace was the “wrong prescription for Colorado.”<sup>6</sup> Similarly, ATR spent \$1,392,781 on advertisements against Rep. Scott Peters (D-CA), including one saying Rep. Peters is a “typical selfish politician” and telling voters to “vote no on Scott Peters for Congress,” and another one nearly identical to the ad against Mr. Pace asserting Mr. Peters was the “wrong prescription for California.”<sup>7</sup> ATR also spent \$3,125,327 against former Rep. Charlie Wilson (D-OH), telling voters, among other things, Mr. Wilson was “the last guy we should send to Congress” and to “vote no” on him.<sup>8</sup>

### **Americans for Tax Reform’s Representations to the IRS**

As a section 501(c)(4) tax-exempt organization, ATR is required to file annual Form 990 tax returns. ATR filed its 2012 Form 990 tax return on November 15, 2013, and Mr. Norquist signed the tax return that day under penalty of perjury.<sup>9</sup>

ATR acknowledged on the tax return it engaged in “direct or indirect political activities on behalf of or in opposition to candidates for public office,”<sup>10</sup> and thus filed a Schedule C regarding its political campaign activities.<sup>11</sup> Schedule C requires tax-exempt organizations to declare the amount they spent for “section 527 exempt function activities”<sup>12</sup> – spending to

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<sup>5</sup> *Id.*; Open Secrets, Americans for Tax Reform, Targeted Candidates, 2012, available at <http://www.opensecrets.org/outsidespending/recips.php?cmte=Americans+for+Tax+Reform&cycle=2012>.

<sup>6</sup> See Americans for Tax Reform, [ATR Announces 1.3 Million Dollar Ad Buy in Colorado’s 3rd Congressional District](http://www.youtube.com/watch?v=LVT8-tdKIKg), October 12, 2012; <http://www.youtube.com/watch?v=LVT8-tdKIKg>.

<sup>7</sup> See Americans for Tax Reform, [ATR Announces 1.6 Million Dollar Ad Buy in California’s 52nd Congressional District](http://www.youtube.com/watch?v=zk_H4x8gjOO), October 12, 2012; [http://www.youtube.com/watch?v=zk\\_H4x8gjOO](http://www.youtube.com/watch?v=zk_H4x8gjOO).

<sup>8</sup> See Americans for Tax Reform, [ATR Announces 1.7 Million Dollar Ad Buy in Ohio’s 6th Congressional District](http://www.youtube.com/watch?v=1IOSlpYdJEM), October 12, 2012; <http://www.youtube.com/watch?v=1IOSlpYdJEM>.

<sup>9</sup> ATR 2012 Form 990, Part II, available at [http://crew.3cdn.net/221d12d111b38aa062\\_arm6b2ivp.pdf](http://crew.3cdn.net/221d12d111b38aa062_arm6b2ivp.pdf).

<sup>10</sup> *Id.*, Part IV, Question 3.

<sup>11</sup> *Id.*, Schedule C.

<sup>12</sup> 2012 Instructions for Schedule C, at 1, 3.

influence “the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors.”<sup>13</sup> When an advertisement explicitly advocates the election or defeat of an individual to public office, the expenditure unquestionably is for a section 527 exemption function activity.<sup>14</sup>

On its Schedule C, ATR declared it spent a total of \$9,791,515 on section 527 exempt function activities in 2012.<sup>15</sup> This amount is \$6,003,067 less than the amount of independent expenditures ATR reported to the FEC.

Astonishingly, this is not the first time ATR has reported far less political activity to the IRS than it did to the FEC. In March 2012, CREW filed a complaint against ATR and Mr. Norquist for remarkably similar misrepresentations on ATR’s 2010 Form 990.<sup>16</sup> On that tax return, ATR reported spending only \$1,859,239 on political activities, but reported to the FEC spending \$4,218,364 on independent expenditures in 2010.

ATR may be trying to claim some of the independent expenditures it reported to the FEC in 2012 constitute “issue advocacy” and need not be reported to the IRS as political activity.<sup>17</sup> ATR cannot, however, tell the FEC – under penalty of perjury – the ads expressly advocate the

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<sup>13</sup> 26 U.S.C. § 527(e)(2). Tax-exempt organizations similarly must disclose on Schedule C their “political expenditures,” defined as “[a]ll activities that support or oppose candidates for elective federal, state, or local public office.” 2012 Instructions for Form 990, at 63. This figure usually is identical to the organization’s exempt function activities.

<sup>14</sup> Rev. Rul. 2004-06; *see also* Election Year Issues, 2002 EO CPE Text at 349, 388.

<sup>15</sup> ATR 2012 Form 990, Schedule C, Part I-C. ATR reported the same figure for its political expenditures. *Id.*, Part I-A.

<sup>16</sup> *See* CREW Files IRS Complaint Against Americans for Tax Reform, March 14, 2012, available at <http://www.citizensforethics.org/legal-filings/entry/irs-complaint-americans-for-tax-reform-grover-norquist-2012>.

<sup>17</sup> It is not clear why ATR reported these advertisements as independent expenditures to the FEC if it believed they are issue ads, but it may be an effort to avoid any possible requirement it disclose its donors under the Federal Election Campaign Act. A March 2012 federal district court decision – later reversed – required groups that broadcast issue ads close to an election to disclose their contributors, and ATR may have reported these ads inaccurately as independent expenditures to avoid any chance of falling under this ruling. *See Van Hollen v. Federal Election Comm’n*, 851 F. Supp. 2d 69 (D.D.C. 2012), *rev’d*, *Center for Individual Freedom v. Van Hollen*, 694 F.3d 108 (D.C. Cir. 2012).

election or defeat of a candidate then turn around and tell the IRS – again under penalty of perjury – they are not. Furthermore, even if some of ATR’s ads fall short of express advocacy they nevertheless constitute political activity and are not issue advocacy under IRS authority. For activities that do not explicitly advocate the election or defeat of a candidate for public office, the IRS applies a facts and circumstances test to determine whether the expenditure constitutes participation in a political campaign or issue advocacy.<sup>18</sup> In making this determination, the IRS considers: (1) whether the statement identifies one or more candidates; (2) whether the statement expresses approval or disapproval for a candidate’s position; (3) whether the statement is delivered close to an election; (4) whether the statement makes reference to voting or an election; (5) whether the issue addressed has been raised as an issue distinguishing candidates for an office; (6) whether the communication is part of an ongoing series of communications by the organization on the issue that are made independent of the timing of any election; and (7) whether the timing of the communication is related to a non-electoral event such as a scheduled vote on specific legislation by an officeholder running in an election.<sup>19</sup>

Applying these factors, all of ATR’s ads constitute intervention in political campaigns. For example, the “wrong prescription” ad ATR ran against Mr. Pace, Rep. Peters, former Rep. Wilson, and others identified each candidate, was delivered very close to the election, expressed strong disapproval of the candidate’s position on “Obamacare,” addressed an issue distinguishing the candidates from their opponents, and was unrelated to a non-electoral event. In fact, ATR itself classifies the ads on YouTube as part of “Americans for Tax Reform’s 2012 Election Ads.”<sup>20</sup> The ads clearly are attempts to influence voters, and treating them as non-political issue advocacy would make a mockery of the distinction between political activity and issue advocacy.

#### **Political Activity Under Section 501(c)(4)**

Section 501(c)(4) provides tax-exempt status to organizations “not organized for profit but operated *exclusively* for the promotion of social welfare.”<sup>21</sup> The statute therefore permits little, if any, activity that does not promote social welfare. Despite the statute’s plain language, IRS regulations interpreting it provide an organization is operated exclusively for the promotion of social welfare if it is “*primarily* engaged in promoting in some way the common good and general welfare of the people of the community.”<sup>22</sup> The regulations further provide “direct or

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<sup>18</sup> Rev. Rul. 2007-41; Rev. Rul. 2004-06.

<sup>19</sup> Rev. Rul. 2007-41.

<sup>20</sup> See [http://www.youtube.com/playlist?list=PLSPzL-xLt64CUFsnrYB2tb\\_3tjWsySUGd](http://www.youtube.com/playlist?list=PLSPzL-xLt64CUFsnrYB2tb_3tjWsySUGd).

<sup>21</sup> 26 U.S.C. § 501(c)(4) (emphasis added).

<sup>22</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2)(i) (emphasis added).

indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office” does not promote social welfare.<sup>23</sup>

The IRS has not further defined the “primary activity” standard, and provides only that all the facts and circumstances are to be taken into account in determining the “primary activity” of a section 501(c)(4) organization.<sup>24</sup> Nevertheless, groups seeking or claiming section 501(c)(4) status have interpreted the requirement to mean they can spend up to 49 percent of their total expenditures in a tax year on activities that do not promote social welfare, such as political campaigns, without such activities constituting the “primary activity” of the organization.

On its tax return, ATR reported spending \$30,915,010 on all its activities in 2012. The \$15,794,582 it reported to the FEC spending on independent expenditures – the correct figure for ATR’s political activities in 2012 – constitutes 51 percent of its total spending.

### Violations

#### 26 U.S.C. § 501(c)(4)

Even under the IRS’s misinterpretation of section 501(c)(4), and certainly under the plain language of the statute, ATR’s political activity exceeds the amount permitted in violation of its tax-exempt status.

#### 26 U.S.C. § 6652

Under the Code, a tax-exempt organization that, without reasonable cause, fails to include any of the information required on a Form 990 tax return, or fails to provide the correct information is liable for civil penalties.<sup>25</sup> By failing to accurately report the funds spent on section 527 exemption function activities on its 2012 Form 990, ATR violated 26 U.S.C. § 6652 and should be subject to monetary penalties.

#### 26 U.S.C. § 7206

Under the Code, any person who “[w]illfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter,” is guilty of a felony and subject to up to three years in prison and a fine of up to

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<sup>23</sup> Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii).

<sup>24</sup> Rev. Rul. 68-45, 1968-1 C.B. 259.

<sup>25</sup> 26 U.S.C. §§ 6652(c)(1)(A)(ii), 6652(c)(4); *see also* 2012 Instructions for Form 990, at 7.

\$100,000.<sup>26</sup> The money spent on section 527 exempt function activities and political expenditures a tax-exempt organization reports to the IRS on its Schedule C is material for several reasons, including: (1) the amounts reported can be used by the IRS to determine whether the organization is complying with its tax-exempt status; (2) the amount an organization expended on section 527 exemption activities in part determines exempt function taxes the organization must pay;<sup>27</sup> and (3) accurate public disclosure of the amount of political activity conducted by tax exempt organizations is critical to the objective of transparency that underlies the reporting required on Form 990.<sup>28</sup>

ATR's 2012 Form 990 tax return was signed by Mr. Norquist under a written declaration that it was made under penalty of perjury, and that Mr. Norquist had examined the return and it was true, correct, and complete to the best of his knowledge.<sup>29</sup> The tax return, however, appears to be false and incorrect as to the material matter of ATR's section 527 exemption function activities and its political expenditures.

Mr. Norquist's representation appears to be willful. Mr. Norquist almost certainly was aware the amount of political spending disclosed on its tax return would be the subject of public interest, in part because of the complaint CREW filed against ATR and Mr. Norquist in March 2012 for misrepresentations on ATR's 2010 Form 990. The amounts at issue then also represented a significant portion of ATR's overall budget – the \$6 million omitted from ATR's 2012 Form 990 is nearly 20 percent of ATR's total expenditures for 2012 – making it nearly impossible for Mr. Norquist to claim ignorance of the discrepancy.

18 U.S.C. § 1001

Federal law further prohibits anyone from “knowingly and willfully” making “any materially false, fictitious, or fraudulent statement or representation” in any matter within the jurisdiction of the executive, legislative, or judicial branch.<sup>30</sup> Violations are punishable by up to five years in prison.<sup>31</sup> By falsely stating on ATR's 2012 Form 990 tax return the organization's

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<sup>26</sup> 26 U.S.C. § 7206(1).

<sup>27</sup> 26 U.S.C. § 527(f)(1).

<sup>28</sup> IRS, Background Paper, Summary of Form 990 Redesign Process, August 19, 2008, at 1.

<sup>29</sup> ATR 2012 Form 990, Part II.

<sup>30</sup> 18 U.S.C. § 1001(a)(2).

<sup>31</sup> *Id.*

Principal Deputy Commissioner Daniel I. Werfel  
November 19, 2013  
Page 7

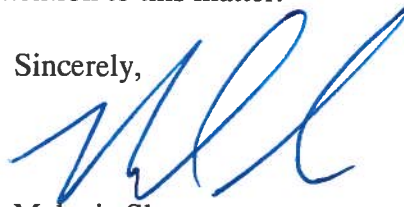
amounts of section 527 exempt function activities and political expenditures, Mr. Norquist and ATR appear to have violated 18 U.S.C. § 1001.<sup>32</sup>

### Conclusion

Based on the publicly available information, it appears ATR activities during the 2012 election cycle do not comport with its status as a section 501(c)(4) tax-exempt organization. Further, it appears ATR and Mr. Norquist intentionally omitted more than \$6 million in spending on political activity from ATR's 2012 tax return. Therefore, the IRS should investigate ATR and, should it find that ATR has violated its tax-exempt status, take appropriate action, which may include revoking its section 501(c)(4) status, imposing any applicable excise taxes under section 4958 for excess benefit transactions, and treating ATR as a taxable corporation or as a section 527 organization. The IRS also should investigate ATR and Mr. Norquist and, should it find they made false or incomplete statements on ATR's tax return and FEC filings, take appropriate action, including but not limited to referring this matter to the Department of Justice for prosecution. Only vigorous enforcement by the IRS will deter other organizations from violating our nation's tax laws for political gain.

Thank you for your prompt attention to this matter.

Sincerely,



Melanie Sloan  
Executive Director  
Citizens for Responsibility and Ethics in Washington

Encls.

cc: IRS-EO Classification  
Kathryn Keneally, Assistant Attorney General  
for the Tax Division, Department of Justice

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<sup>32</sup> ATR and Mr. Norquist also may have violated 18 U.S.C. § 1001(a)(2) filing false reports with the FEC. ATR reported to the FEC that all of the advertisements it ran were independent expenditures. In fact, however, ATR appears to be asserting in its IRS forms that a significant portion of the ads did not constitute such expenditures.